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No. 86-711

In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS PECORA AND JAMES PAONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions.

2. Whether the district court erred in admitting taped conversations of co-conspirators under Fed. R. Evid. 801(d)(2)(E).

3. Whether the admission of the taped conversations of petitioners' co-conspirators violated petitioners' rights under the Confrontation Clause of the Sixth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 798 F.2d 614. The opinion of the district court (Pet. App. D1-D49) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on July 2, 1986, and a petition for rehearing was denied on August 21, 1986 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of racketeering, in violation of 18 U.S.C. 1962(c), and racketeering conspiracy, in violation of 18 U.S.C. 1962(d). Pet. App. A2. Petitioner Paone was sentenced to concurrent nine-year terms of imprisonment on each count and a $25,000 fine. Petitioner Pecora was sentenced to concurrent five-year terms of imprisonment on each count and a $15,000 fine.

1. The evidence at trial showed that petitioner Pecora, the general manager of Federico Trucking, Inc. (FTI), made payments over a ten-year period to petitioner Paone, the business agent and recording secretary of Local 863 of the International Brotherhood of Teamsters. The government alleged that those payments were intended to influence Paone in the conduct of union affairs and that they therefore violated Section 302(a) and (b) of the Taft-Hartley Act, 29 U.S.C. 186(a) and (b). The government further alleged that under 18 U.S.C. 1961 (1)(C), the Taft-Hartley violations formed the predicate acts required to establish a pattern of racketeering activity. Pet. App. A2-A3.

Petitioners' scheme was fairly simple. Local 863 represented truckdrivers employed by Foodhaulers, Inc., a New Jersey trucking company. In 1972, Foodhaulers subcontracted to FTI various trucking services in New Jersey. FTI's drivers already were members of Teamsters Local 202. The subcontract was a sham, however, and Foodhaulers used it as a means to hire drivers who were not members of Local 863, in violation of its collective bargaining agreement with

Local 863. Pecora conspired to pay Paone so that Paone would use his influence to prevent Local 863 from asserting jurisdiction over FTI's driver employees, and so that Local 863 would not object to the sham subcontract with Foodhaulers. From 1972 to 1981, Paone received approximately $235,000 from Pecora. The payments were disguised as paychecks to FTI employees, but the employees turned out to be "ghost" employees who did not work for FTI. In addition, FTI made several thousand dollars in welfare fund contributions on behalf of Paone's sister, who never worked for FTI. Pet. App. A3-A4.

2. The district court, in a detailed opinion, denied petitioners' motions for a judgment of acquittal and a new trial (Pet. App. D1-D49). The court rejected petitioners' claim that the evidence did not support the violations of 29 U.S.C. 186 that were alleged as the predicate acts of racketeering activity. Contrary to petitioners' contentions, the district court ruled that their conduct violated three separate subsections of Section 186(a) and thereby violated Section 186 (b) as well.

3. The court of appeals affirmed in a comprehensive opinion (Pet. App. A1-A35) on which we rely. The court of appeals agreed with the district court that petitioners' conduct violated three separate subsections of the Taft-Hartley Act, Section 186(a)(1), (2), and (4) (Pet. App. A5-A20). With regard to petitioners' objection to the admission of a tape-recorded conversation among two of petitioners' co-conspirators and a government informant, the court held that the statements in the conversation were admissible as co-conspirator declarations (*id.* at A30-A33) and that they were sufficiently reliable to satisfy the Confrontation Clause (*id.* at A20-A30).

ARGUMENT

1. Petitioners' principal contention (Pet. 21-42) is that there was insufficient evidence to prove a violation of any of the three pertinent subsections of 29 U.S.C. 186(a).[1] We note at the outset that only one of the three subsections need be satisfied to warrant a conviction. We also note that here, as below, petitioners offer no explanation of what the "intent" of the payoffs was, if not to influence petitioner Paone in his union activities with regard to members, or prospective members, of Local 863.

a. Section 186(a)(1) makes it unlawful for an employer to pay something of value to "any representative of any of his employees." Purportedly relying on *United States* v. *Ryan*, 350 U.S. 299 (1956), petitioners argue that Paone was not a "representative" within the meaning of the statute because he did not represent FTI employees with regard to wages, hours, and other working conditions. Petitioners concede that certain employees of FTI were members of the Local 863 welfare fund (Pet. 13), but they contend that those employees' participation in the Local 863 welfare fund did not make Paone their "representative" within the meaning of Section 186. As both courts below concluded, however, *Ryan* supports a broad reading of the term "representative" rather than the narrow one petitioners propose. Indeed, the Court in *Ryan* specifically rejected a proposed "narrow reading of the term 'representative' [because it] would substantially defeat the congres-

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[1] Proof of a violation of Section 186(a) by Pecora—for making unlawful payments to a union officer—constitutes proof of a violation of the reciprocal provisions of Section 186(b) by Paone—for accepting such payments.

sional purpose" (350 U.S. at 304). In the course of reviewing the statute's legislative history, the Court listed "union officials, or * * * other individuals as trustees [of welfare funds]," " 'any person in a position of trust in a labor organization,' " and a " 'union representative * * * shaking down the employer' " as examples of "representatives" (*id.* at 305-306 (citations omitted)). On the basis of that legislative history, the *Ryan* Court concluded that Section 186 provides a broad prohibition against "payments by employers to individuals who represent employees in their relations with the employers" (*id.* at 307).

Here, there was evidence that the office employees at FTI paid union dues to Local 863; that FTI employees "were listed by Local 863 as being on 'withdrawal' after they stopped paying dues, indicating that they had indeed been members of * * * Local [863]"; and that FTI made contributions to the Local 863 welfare fund, through which its office employees received fringe benefits (Pet. App. D15-D16). The court of appeals was also clearly correct in pointing out that "participation in an insurance program itself may be considered a part of the wage package" (*id.* at A9), particularly since for that participation "there must be some determination of the amount of the contributions on [the employees'] behalf, the mechanics of payment, the claims procedure, the means by which claims disputes are resolved, and so on" (*id.* at A10). The purpose of Section 186 is "[t]he stamping out of 'all forms of bribery' between management and labor officials" (*id.* at A11 (citations omitted)), and petitioners offer nothing other than their construction of *Ryan* to suggest that the bribery of the union officer in this case did not fall plainly within the statutory language and intent.

b. The evidence also established a violation of Section 186(a)(2), which makes it unlawful for an employer to pay anything of value to a labor organization, or its employee, which "represents, seeks to represent, or would admit to membership, any of the employees of such employer * * *." Petitioners argue that Local 863 could not admit FTI employees because of the "contract bar rule" (Pet. App. D18-D19).[2] As the district court noted, however, "the statutory language [is not] * * * coextensive with the contract bar rule even if it were applicable to this case" (*id.* at D19). The statute's language—and its purpose of closing up various statutory loopholes (see *id.* at A13-A14)—indicates that nothing less than an unchallengeable bar to membership could defeat the applicability of the statute. And, as the court of appeals pointed out (*id.* at A16), Local 863 could have challenged the Teamster joint council ruling that underlay the "bar." Furthermore, the bar operates generally for no longer than three years, and the payoffs here lasted for ten years. See *id.* at A11-A12; 2 T. Kheel, *Labor Law* § 7A.03[3][a], at 7A-45 (1984 & Supp. 1986). The obvious purpose of the payoffs was to obtain Paone's forbearance from seeking to have Local 863 represent FTI truckdrivers; in this setting, the jury could reasonably conclude that, absent the payoffs, Paone's union "would admit to membership" the employees of Pecora's company.

Even aside from the obvious purpose of the payoff scheme, there was ample evidence that Local 863

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[2] The NLRB's contract bar rule limits the right of rival unions to organize workforces already represented by another union and working under a collective bargaining agreement. See 2 T. Kheel, *Labor Law* § 7A.03[3], at 7A-45 to 7A-64 (1984 & Supp. 1986); Pet. App. A11-A12 n.3.

would otherwise have been likely to seek to represent FTI's drivers. It was stipulated that as a general matter Local 863 admitted drivers working in New Jersey; Local 863 was the representative of Foodhaulers, the company with which FTI had subcontracted; and the history of FTI, Local 863, and Local 202 could be interpreted by a rational jury as demonstrating that Local 863 had wanted, was now willing, and would in the future want to admit FTI drivers (Pet. App. D19-D23). Indeed, counsel for petitioner Paone conceded that Local 863 would have sought to represent the FTI drivers if Local 202 did not already represent them (*id.* at D23). Furthermore, the government pointed out that Local 863 could easily have asserted a colorable claim to the right to organize FTI drivers on the basis that the subcontract was a sham and that Foodhaulers was the true employer of the FTI drivers (*id.* at A12).

The court of appeals accurately noted the anomalies that petitioners' interpretation of Section 186 (a)(2) would create. The payoffs, after all, "deprived the FTI drivers of the freedom to decide whether to be represented by another local when and if the choice were presented to them, and deprived Local 863 members of the possibility of strengthening their union both numerically and with respect to the consistency of representation within the geographic jurisdiction of the local" (Pet. App. A14-A15). The court of appeals, moreover, was "unwilling to hold that, where an employer pays off a union to keep it from attempting to represent its workers, the existence of possible roadblocks to the actual accomplishment of the union's 'threat' will conclusively render [Section 186(a)(2)] inapplicable" (Pet. App. A15-A16). Finally, the court of appeals correctly

concluded that petitioners' construction of the statute "would allow employers to evade the operation of [Section 186(a)(2)] by timing their payoffs in such a way that they were paid at times when a union local could not assert its right, and would require an inquiry into subjective intentions of employees, employers, and union officials" (Pet. App. A16).[3]

[3] Petitioners assert (Pet. 34-36) that the court of appeals (Pet. App. A17-A19) did not convincingly distinguish *United States* v. *Sink*, 355 F. Supp. 1067, 1070-1071 (E.D. Pa.), aff'd, 485 F.2d 683 (3d Cir. 1973), and *United States* v. *Cody*, 722 F.2d 1052, 1058-1059 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984), from the present case, although they do not elaborate on why they find the court's analysis unsatisfactory. The court of appeals was correct in pointing out that according to *Sink* the jury instruction requiring that there be a "present intention" of membership admission—the standard for which petitioners argued below—"may have been more beneficial to the defendant than required" (355 F. Supp. at 1071). The court of appeals was also correct in noting that in *Sink* the defendant was bribed not to organize employees who were not yet within his jurisdiction, while in this case the employees were already within Paone's jurisdiction. In any event, the defendant's motion in *Sink* was denied and the decision was only a district court ruling. Even if the summary affirmance by the court of appeals could somehow be construed as being in conflict with the decision in this case, it would create only an intracircuit conflict.

With respect to *Cody*, similarly, we agree with the court that it is quite significant that, in holding that Section 186(a)(2) was not concerned with "the possible future hiring of present union members," the Second Circuit noted that the statute was passed "for a specific reason—to deal with employers' attempts through bribery of union officials to block unionization of their *present* employees" (722 F.2d at 1058-1059 (emphasis in original; citation omitted)). That is precisely the factual situation in this case. Thus, the analysis in *Cody* is entirely consistent with the analysis of the court below; *Cody* therefore supports the application of

c. Section 186(a)(4) makes it unlawful for an employer to pay an officer or employee of a labor organization something of value "with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization." There was ample evidence presented to support the government's allegations that FTI's drivers were in fact working for Foodhaulers—and thus that the "subcontract" was a sham and that Pecora was paying Paone to look the other way and not complain on behalf of Local 863 about that violation of the collective bargaining agreement. The drivers who worked for FTI had many indicia of employment by Foodhaulers. Foodhaulers paid the workers' compensation premiums for FTI drivers, administered driving tests to them, and had the power to fire them. Foodhaulers also accepted employment applications, checked references, and gave I.D. cards and medical examinations to the FTI drivers. Pet. App. A4, D25-D26.[4]

Petitioners' contention on this point repeats their Section 186(a)(1) and (2) arguments: that because Paone was not a "representative" of the FTI employees and because Local 863 could not admit the FTI drivers, the payoffs could not possibly have been made with intent to influence Paone's official actions. But even if petitioners are correct on the Section 186(a)(1) and (2) points—and, as just discussed,

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Section 186(a)(2) to Pecora's scheme to bribe Paone so that he would not seek to unionize the FTI drivers.

[4] If the jury found the subcontract to be a sham, that would of course greatly simplify the Section 186(a)(1) and (2) issues. Petitioner Pecora's payments would then be on behalf of Foodhaulers, and certainly Paone was a "representative" of Foodhaulers' employees.

they are not—it still would not follow that there is no Section 186(a)(4) violation. Petitioner Paone certainly was a representative of *Foodhaulers'* employees, and the jury could properly have found that the payoffs were made to influence Paone with respect to his duties to them.

2. Petitioners next challenge (Pet. 42-55) the admission of a 1979 tape recording by the district court, on the ground that it failed to meet the requirement in Fed. R. Evid. 801(d)(2)(E) that it be "in furtherance of the conspiracy." The recording was a conversation among Anthony Carratura, a "ghost" employee who became a government informant; Joseph Picco, another "ghost" employee; and Fred Paone, petitioner's nephew who served as a middleman in the conspiracy. The conversation reflected the conspirators' attempts, in anticipation of a government investigation, to get their stories straight about what their jobs entailed. Picco and Fred Paone were unindicted co-conspirators. Pet. App. A20-A21.

Petitioners claim that the conversation was not in furtherance of the conspiracy because its purpose was solely to conceal the declarants' participation in the conspiracy after their participation in it had concluded. The district court, however, found that the declarants had not withdrawn from the conspiracy at the time of the conversation (see Pet. App. A33). Their statements, moreover, served the purpose of concealing the ongoing conspiracy, enabling petitioners to continue their illegal payoff scheme for two more years (*id.* at A32). As this Court said in *Grunewald* v. *United States*, 353 U.S. 391, 405 (1957) (emphasis in original), "a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the

conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." [5] Here, the concealment that was the subject of the taped conversation fell into the former category. Accordingly, any contention that the conversation was not "in furtherance of the conspiracy" is meritless and was properly rejected by both courts below.

3. Petitioners' final claim is that the admission of the 1979 tape recording violated their rights under the Confrontation Clause of the Sixth Amendment (Pet. 55-62).

Petitioners had originally based their Confrontation Clause argument on the alleged failure of the government to demonstrate the unavailability of the co-conspirators at trial, relying on *United States* v. *Inadi*, 748 F.2d 812 (3d Cir. 1984), rev'd, No. 84-1580 (Mar. 10, 1986). The government contended that petitioners had not made a timely objection, and that in any event the Third Circuit's decision in *Inadi* was wrong. When this Court reversed the decision in *Inadi*, the court of appeals asked for additional briefing from the parties. At that point, petitioners made their current claim that the taped conversation lacked

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[5] This point serves to distinguish *Lutwak* v. *United States*, 344 U.S. 604 (1953), *Krulewitch* v. *United States*, 336 U.S. 440 (1949), and, of course, *Grunewald*, on which petitioners rely. Petitioners rely on the panel decision in *United States* v. *Howard*, 752 F.2d 220 (6th Cir. 1985), but they fail to point out that the panel decision was subsequently reversed by the en banc court in an opinion that squarely supports the result in this case. *United States* v. *Howard*, 770 F.2d 57, 60-61 (6th Cir. 1985) (en banc), cert. denied, No. 85-5865 (Feb. 24, 1986). *United States* v. *Urbanik*, No. 85-5531 (4th Cir. Sept. 23, 1986), is inapposite since there the declarants were not conspiring or talking about a conspiracy at all.

"reliability," an issue that the Court in *Inadi* did not address. Pet. App. A21. The court of appeals rejected petitioners' argument that the government was required to show that the declarants were unavailable because the recording here was less reliable than that in *Inadi*. As the court of appeals noted, *Inadi* flatly held that " 'the unavailability rule, developed for cases involving former testimony, is not applicable to co-conspirators' out-of-court statements' " (Pet. App. A24-A25 (quoting *Inadi*, slip op. 6-7)). The court of appeals nonetheless held that there is an independent Confrontation Clause requirement that co-conspirator testimony be shown to be reliable, even though that requirement has nothing to do with the declarant's unavailability. The court accordingly applied the analysis adopted in *United States* v. *Ammar*, 714 F.2d 238 (3d Cir.), cert. denied, 464 U.S. 936 (1983), and concluded that the tapes bore sufficient indicia of reliability to satisfy the Confrontation Clause.

Petitioners continue to argue that, despite *Inadi*, the government must establish the unavailability of co-conspirator declarants when the reliability of co-conspirator declarations is at issue (Pet. 57, 61-62). As the court of appeals correctly pointed out, that argument is foreclosed by *Inadi*. The Court's opinion in *Inadi* makes it very clear that a showing of unavailability on the part of the declarants is not a prerequisite to the admission of statements that are otherwise admissible as declarations of co-conspirators. *Inadi*, slip op. 12-13.

It is also not necessary to hold this case for *Bourjaily* v. *United States*, cert. granted, No. 85-6725 (Oct. 14, 1986). The Third Circuit conducted a separate inquiry into the reliability of the co-conspirator declarations in this case under the Confrontation

Clause. The issue in *Bourjaily* is whether such an inquiry is necessary, or whether the Confrontation Clause is satisfied when the requirements of the federal rule governing co-conspirator statements are met. Because the Third Circuit has already conducted the inquiry that Bourjaily has asked this Court to order, a decision in favor of the petitioner in that case will not help the petitioners here. Thus, regardless of the outcome of *Bourjaily*, further review of the court of appeals decision in this case will not be warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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